FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp. *and* International Brotherhood of Electrical Workers, Local 272, AFL–CIO. Cases 06–CA–163303 and 06–CA–170901

May 16, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On March 15, 2017, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by unilaterally changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act when, after the parties reached impasse, the Respondent selectively implemented collective-bargaining proposals that were "inextricably intertwined" with other, unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581 (1982), enfd. 44 F.3d 1320 (6th Cir. 1995); and *Cleveland Cinemas Management Co*., 346 NLRB 785 (2006). Accordingly, we agree with the judge's finding that during contract negotiations and as set forth in the Respondent's final preimpasse offer (its "Second Comprehensive Offer of Settlement"), the Respondent consistently proposed tying and offsetting the elimination of employees' "in-the-box" retiree health benefits with annual contributions to employees' health-savings accounts (HSA) or 401(k) accounts, general wage increases, equity adjustments, and shift differentials. Upon impasse, however, the Respondent unilaterally eliminated the "in-the-box" retiree health benefits and made HSA or 401(k) payments, but did not implement inextricably intertwined parts of its preimpasse proposal, including the general wage increases, equity adjustments, and shift differentials. We agree with the judge that the principles in *Plainville Ready Mix* readily apply and support a violation here, with a minor clarification. In *Plainville Ready Mix*, the Board adopted the judge's finding that the employer's partial implementation regarding wages and incentive pay and gain sharing plans in its final offer before the second impasse (not the first impasse, as the judge finds) was unlawful. 309 NLRB at 583. That is, in its final proposal before the second impasse, the employer proposed eliminating gain sharing and incentive pay plans "in conjunction with" an offsetting increase in hourly wage rates. Id. at 582. But, after the second impasse, the employer eliminated its gain sharing and incentive pay plans without implementing its inextricably linked proposal of increasing hourly wage rates, and the Board adopted the judge's finding that this partial implementation was unlawful. 309 NLRB at 588.

Member Emanuel took no part in the consideration of *Plainville Ready Mix* and expresses no view as to whether it was properly decided. However, he agrees with his colleagues that the strong record evidence here establishes that the Respondent's proffered wage increases, shift differentials, equity adjustments, and HSA or 401(k) contributions were "inextricably linked" to the elimination of "in-the-box" retiree health benefits under the narrow doctrine set forth in *Plainville Ready Mix* and its progeny. Throughout bargaining, these proposals were consistently presented as a quid pro quo, with ample record evidence showing that the provision of these employment benefits was explicitly contemplated as a way for the Respondent to help employees offset the increased costs employees would face upon the termination of "in-the-box" health benefits, and to allow employees to share in some of the cost savings brought about by the elimination of the benefits.

Finally, having found that the Respondent violated Sec. 8(a)(5) and (1) based on the rationale set forth above, we find no need to pass on the General Counsel's additional theory that the Respondent unlawfully conditioned the proposed wage increases in its preimpasse offer on ratification of a new collective-bargaining agreement, a permissive subjective of bargaining. See *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958).

We also affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to bargain with the Union when it subcontracted bargaining unit work associated with its unit 1 turbine outage at its Bruce Mansfield facility in 2016 (the "M116 Outage") without providing the Union notice and an opportunity to bargain. In doing so, we reject the Respondent's argument, raised for the first time on exceptions, that it was acting in accordance with a subcontracting provision in the parties' expired collective-bargaining agreement. We deem such argument to be untimely raised and thus waived, as it was not argued before the judge. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed.Appx. 577 (9th Cir 2009); *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

[2] We shall modify the judge's recommended Order to conform to the Board's findings and its standard remedial language.

Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Unilaterally implementing provisions from the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015, that were inconsistent with its final, preimpasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials, in addition to the HSA and 401(k) payments.

(c) Failing and refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

(b) Upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date the Respondent eliminated the "in-the-box" retiree health benefits.

(c) Make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either the Respondent's elimination of the "in-the-box" retiree health benefits or its failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in paragraph 2(b) above.[3]

(d) Make affected bargaining unit employees whole, with interest, for loss of earnings resulting from the Respondent's unilateral subcontracting of bargaining unit work associated with the M116 Outage.

(e) Compensate affected bargaining unit employees and former bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(f) Provide the Union in a timely manner the information it requested on February 10, 2016, related to the wages and material costs paid to subcontractor General Electric for the work associated with the M116 Outage.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the

[3] In the event the Union opts to have the Respondent reinstitute the "in-the-box" retiree health benefits, at the compliance stage the Respondent may litigate whether any particular employee's losses resulting from the elimination of those benefits should be offset by any HSA or 401(k) payments the Respondent previously made for the benefit of that employee. See *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003) (the Board permits the employer to litigate at compliance whether back payments to union funds should be offset by what it spent to provide employer-sponsored benefits), enfd. 112 Fed.Appx. 60 (D.C. Cir. 2004).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 16, 2018

_____
Mark Gaston Pearce, Member

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Lauren McFerran, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage, without first notifying the Union and giving it an opportunity to bargain about such changes.

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT unilaterally implement provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015, that are inconsistent with our final, pre-impasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT fail and refuse to provide the Union with requested information, such as the wages and material costs paid to General Electric for the M116 Outage work, that is relevant and necessary to the Union's role as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes to your wages, hours, or other terms and conditions of employment, including, but not limited to, the subcontracting of unit work, notify, and on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

WE WILL, upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with our Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date we eliminated the "in-the-box" retiree health benefits.

WE WILL make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either our elimination of the "in-the-box" retiree health benefits or our failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in the paragraph above.

WE WILL make you whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the M116 Outage.

WE WILL compensate you for any adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 within 21 days of the date the amount of backpay is fixed, either

by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

WE WILL provide the Union in a timely manner the information requested on February 10, 2016, related to the wages and material costs paid to General Electric for the work associated with the M116 Outage.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Board's decision can be found at www.nlrb.gov/case/06–CA–163303 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

David Shepley, Esq., for the General Counsel.
Brian W. Easley, Esq., for the Respondent.
Marianne Oliver, Esq., for the Charging Party.

DECISION

I. INTRODUCTION

ANDREW S. GOLLIN, Administrative Law Judge. These consolidated cases were tried before me on December 1–2, 2016, in Pittsburgh, Pennsylvania. The International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union or Local 272) filed the underlying charges alleging FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.[1] (Respondent or the Company) committed unfair labor practices affecting the unit employees at its Shippingport, Pennsylvania powerplant.

The first case involves Respondent's partial implementation of its final pre-impasse offer to the Union. Respondent implemented certain proposals, including the elimination of retiree health benefits, but not its proposed increases to wages and shift differentials, stating those increases would be effective only upon contract ratification. The complaint presents two theories for why Respondent's failure to implement the proposed increases to wages and shift differentials violated Sections 8(a)(5) and (1) of the National Labor Relations Act (Act). First, the General Counsel argues that because Respondent proposed the increases as part of a package to compensate for the elimination of the retiree health benefits, it was obligated to also implement those proposed increases when it eliminated the retiree health benefits. Second, the General Counsel alleges that contract ratification is a permissive subject of bargaining, and Respondent was prohibited from making it a condition precedent to implementing the increases. Respondent denies the alleged violations. Based upon the evidence and applicable law, I find Respondent committed the violations as alleged, under both theories.

The second case involves Respondent's subcontracting of scheduled maintenance work historically performed by unit employees. The complaint alleges Respondent violated Sections 8(a)(5) and (1) of the Act when: (1) it subcontracted this unit work without providing the Union with notice and an opportunity to bargain over the decision to subcontract or its effects; and (2) when it failed or refused to provide the Union with the wages and material costs paid by the subcontractor. Respondent denies the allegations. I find Respondent breached its duty to bargain over the decision to subcontract because it announced its decision as a fait accompli. I also find the Union has met its burden of establishing the relevance of the requested subcontracting information.[2] Based on the evidence and applicable law, I find Respondent committed these violations as alleged.[3]

II. STATEMENT OF THE CASE

On November 4, 2015, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–163303. On February 29, 2016, the Union filed an amended unfair charge against Respondent in Case 06–CA–163303. Based on its investigation, on May 27, 2016, the Acting Regional Director for Region 6 of the Board, issued a complaint in Case 06–CA–163303, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act.[4] On June 9, 2016, Respondent

[1] At the hearing, the parties stipulated to amending the pleadings to correct the employer's name to be FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.

[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g.,*Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] I make no finding regarding Respondent's alleged failure to engage in effects bargaining because the General Counsel appears to have abandoned that allegation by failing to raise or address it during the hearing or in his posthearing brief.

[4] On March 11, 2016, the Acting Regional Director issued a partial dismissal letter in Case 06–CA–163303, dismissing, among others, the allegation that the Company violated Sec. 8(a)(5) and (1) of the Act when it failed to implement its proposed wage increases. On April 22, 2016, the Regional Director issued an amended dismissal letter rescinding the earlier dismissal, stating the allegations that the Company "failed to implement a proposed wage increase when it implemented its other terms of employment contained in its last comprehensive offer and, conditioned the implementation of this wage and shift differential increase upon membership ratification, are being retained for further

filed its answer in Case 06–CA–163303, denying all alleged violations of the Act.

On March 2, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–170901. Based on its investigation, on July 29, 2016, the Regional Director for Region 6 of the Board issued a complaint in Case 06–CA–170901, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act. On August 11, 2016, Respondent filed its answer in Case 06–CA–170901, denying all alleged violations of the Act.

On November 10, 2016, the Regional Director for Region 6 issued an Order Consolidating Cases in Cases 06–CA–163303 and 06–CA–170901.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel both filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following[5]

III. FINDINGS OF FACT

A. Jurisdiction and Labor Organization Status

Respondent has been a corporation with an office and place of business in Akron, Ohio, and has been engaged in the operation of power generation plants in several states, including at its Bruce Mansfield plant located in Shippingport, Pennsylvania ("Bruce Mansfield facility"). In conducting its operations during the 12-month period ending February 29, 2016, Respondent derived gross revenues in excess of $250,000. During the 12-month period ending February 29, 2016, Respondent purchased and received goods at its Bruce Mansfield facility valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization with the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction over this case, pursuant to Section 10(a) of the Act.

B. Respondent's Operations

Respondent operates coal-fired power generating plants throughout Ohio and Pennsylvania, including its Bruce Mansfield facility. The Bruce Mansfield facility contains three identical power generating units, referred to as Unit 1, Unit 2 and Unit 3. Each unit consists of a turbine, a generator, a boiler, valves, and other auxiliary equipment. Each unit operates as an integrated system. The system begins with the burning of coal to boil water to create highly pressurized steam; the steam is then pumped into the turbine-generator to produce electricity; and that electricity is released to the power grid for distribution and consumption. Respondent supplies power to the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), a federally regulated transmission organization that oversees the regional electricity markets.

C. Collective-Bargaining Relationship

The Union represents a unit of approximately 230 production and maintenance employees at the Bruce Mansfield facility.[6] The parties' most recent collective-bargaining agreement was dated from December 5, 2009, to February 15, 2013. On August 16, 2012, the parties entered into a memorandum of agreement extending their collective-bargaining agreement, with certain modifications, until February 15, 2014. The Union never held a ratification vote over this extension agreement.[7]

The parties began negotiations over a successor agreement on December 19, 2013, and those negotiations continued until September 18, 2015. The Company's negotiation committee included Anthony Gianatasio, Labor Relations Representative. Gianatasio reported to Charles Cookman, the Company's Executive Director of Labor Relations and Safety. Cookson participated in the negotiations beginning in late 2014. Gianatasio and Cookman are supervisors and/or agents of the Company within the meaning of Section 2(11) and (13) of the Act. The Union's negotiation committee was led by Herman Marshman, Union President. The parties failed to reach a successor agreement prior to the expiration of the extension agreement, but they continued to negotiate, as detailed below, until reaching an impasse as of October 27, 2015.[8]

IV. UNFAIR LABOR PRACTICES

A. 06–CA–163303

1. Background

As previously stated, the parties began negotiations for a new agreement in December 2013, and those negotiations continued into 2014. On September 25, 2014, the Company gave the Union its Comprehensive Offer of Settlement, which detailed the Company's offer for an overall agreement. (R. Exh.

processing." Both allegations are contained in the complaint in Case 06–CA–163303.

[5] Abbreviations in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

[6] The Union has been the exclusive collective-bargaining representative, within the meaning of Sec. 9(a) of the Act, of all production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, results, and yard departments, employed at Respondent's Shippingport, Pennsylvania facility, excluding technicians, office clerical employees and guards, professional employees and supervisors as defined in the Act.

[7] The Union did not submit this extension for ratification because it was not a new agreement. (Tr. 158.)

[8] At the hearing, the General Counsel and Respondent entered into a stipulation that the parties were at a good-faith impasse in their negotiations as of October 27, 2015. The Union did not participate in, but did not object to, this stipulation, stating that its position has been and remains that the parties were not at impasse. Regardless, the General Counsel controls the complaint, and the Union may not enlarge upon or change the General Counsel's theory of the case. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed.Appx. 577 (9th Cir. 2009). Based upon the stipulation, I will accept, without further analysis, the parties were at a good-faith impasse when Respondent implemented the changes at issue on October 27, 2015.

1.) One of the key changes the Company sought during these negotiations was to eliminate retiree health benefits. Article XVIII, Section 3 of the parties' collective-bargaining agreement allowed current employees who retired during the term of the agreement to continue to participate in their chosen health benefit plan until the expiration of the agreement in effect at the time of their retirement, with the Company paying a portion of their health care and prescription drug coverage costs. The parties refer to these as "in-the-box" retirees because the amount the Company paid was set forth in a box chart in Article XVIII of the collective-bargaining agreement. Upon expiration of the agreement, these retirees then come out of the box.[9] "Out-of-the-box" retirees are eligible to enroll in a different, higher-cost company health care plan.[10]

The Company's Comprehensive Offer of Settlement proposed eliminating health benefits for "in-the-box retirees" as of December 31, 2014.[11] This Offer also proposed annual wage increases, referred to as General Wage Increases (GWI), that would go into effect following contract ratification. The proposed increases were scheduled to go in effect as follows: one and one half percent (1½ percent) GWI effective the date of ratification; an additional one percent (1 percent) GWI effective 1 year following the date of ratification; and an additional one percent (1 percent) GWI effective 2 years following the date of ratification. This Offer also proposed increasing the shift differentials paid to employees for hours worked during the afternoon and evening shifts, and on Sundays, all effective upon ratification.[12] (R. Exh. 1.) The Union did not present this Offer to its members for ratification.

2. December 8, 2014 bargaining session[13]

On December 8, 2014, the parties' committees met at the Radisson Hotel in Beaver Falls, Pennsylvania, for bargaining. The evidence about this December 8 bargaining session consisted of the testimony of Charles Cookson, Respondent's executive director of labor relations and safety, and the notes of Respondent's bargaining committee member, Tony Gianatasio.[14]

At this December 8 session, the parties discussed several topics, including Company's proposal to eliminate "in-the-box" retiree health benefits. The Union, through President Herman Marshman, stated the Company should provide some compensation for the loss of the retiree health care subsidies, and asked what percentage of the cost savings from the elimination of these subsidies was the Company willing to share with the Union. There was some discussion. Gianatasio's notes reflect the Company then orally made the following proposal:

> 1. A contribution of $500 for those with individual health care coverage and $1000 for employee/spouse, employee/child and family coverage to [the employee's health savings accounts] HSAs. If they do not participate in a FirstEnergy HSA, the money would be placed in their 401(k) account. This would be in each year of the contract in addition, you can choose one of the options from below:
> 2. If you end the new retiree health care box 12/31/14 we would provide a general wage increase in each year of the contract as follows:
>
> a. 3% at ratification
> b. 2.5% one year after ratification
> c. 2.5% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment[15] to all classifications at the time of ratification
>
> 3. If you end new retiree health care box 12/31/15 we would provide a general wage increase in each year of the contract as follows:
>
> a. 2.5% at ratification
> b. 2.0% one year after ratification
> c. 2.0% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment [to] all classifications at the time of ratification (GC Exh. 11).[16]

In response to Marshman's earlier question about how much of the savings was the Company willing to share with the Union, Cookson stated that the Company would save $1.25 million a year by ending the retiree health care benefits by the end of 2014, and its proposed offer (discussed above) would cost it $1 million a year. The parties then discussed other topics, including safety, before returning to retiree health benefits. Marshman told Cookson he wanted to see if there was a reasonable way to distribute the savings, and Cookson responded that the Company's offer shows it was flexible. Marshman asked if Cookson would seriously entertain a counter offer, and

[9] Charges over retiree health benefits were the subject of prior litigation. See *FirstEnergy Generation Corp.*, 358 NLRB 842 (2012), affd. 362 NLRB No. 66 (2015) (Board reaffirmed prior Board decision which was decided without a quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013)).

[10] The record does not address what, if any, amounts Respondent pays towards "out-of-the-box" retiree health benefits.

[11] Hereinafter the terms "in-the-box" retiree health benefits and retiree health benefits will be used interchangeably to refer to the health benefits paid to employees for the remainder of the agreement in effect at the time of their retirement.

[12] All the Company's wage proposals stated any increases would be effective upon ratification. Cookson testified the Company has an internal policy that it will not pay increases retroactively. (Tr. 173.)

[13] There was no detailed evidence presented regarding bargaining prior to December 8, 2014.

[14] Gianatasio's notes provide more detail and context as to what was discussed, and nothing in Cookson's testimony contradicted Gianatasio's notes. Gianatasio was not called to testify. No other witness was called to testify about this bargaining session.

[15] As discussed below, Bruce Mansfield unit employees earn less per hour than their counterparts at the Company's Sammis power plant in Stratton, Ohio. This "equity adjustment" refers to the Company's offer to increase wages for Bruce Mansfield unit employees to bring them closer to the Sammis employees.

[16] Cookson confirmed the Company made this December 8 oral proposal because the Union had objected to the Company's proposal in its Comprehensive Offer of Settlement to eliminate "in-the-box" retiree health benefits by the end of 2014, and that the Company made this December 8 oral proposal to offer higher wage increases if the Union agreed to end retiree health benefits by the end of 2014, and lower wage increases if it agreed to end them by the end of 2015. (Tr. 162–163.)

Cookson said he would. Cookson then asked if the Union was rejecting the Company's offer, and that he (Cookson) had just shown how the Company was offering the Union back 80 percent of the savings it would receive from eliminating retiree health benefits. There was some additional discussion about Respondent's proposal, and the Union asked questions about the Company's calculations regarding the amount of the savings. Marshman explained that the Union "can't even get a compromise to formally compensate for what is being lost." Cookson responded, "I've offered you a way to extend the new box to the end of 2015. I offered contributions to the HSA as a way to deal with that going forward." (GC Exh. 11.)

The discussion then moved to the wage disparity that existed between the employees working at Bruce Mansfield and the employees working at the Company's Sammis facility. The Union wanted to bring wages at the Bruce Mansfield facility closer to those at the Sammis facility. Cookson pointed out that the Company was offering a $.75 per hour equity adjustment across the board to help "bridge that gap" for every employee at the Bruce Mansfield facility. Marshman questioned why the Bruce Mansfield employees should be paid less for the same work. In the end, Marshman rejected the Company's proposal, stating that the parties had a number of other matters to address. That was the end of the session. The Union never presented the Company's oral offer to its members for consideration.

3. Cookson and Marshman one-on-one meetings in July and August 2015

The parties had no further bargaining sessions scheduled following their December 8, 2014 session. In the spring 2015, Cookson contacted Marshman about the two meeting alone. Cookson hoped this would help facilitate the resumption of bargaining. The two agreed to meet on July 7, 2015, at a Perkins Restaurant in Austintown, Ohio.

On July 7, 2015, Cookson and Marshman met as planned. Because the proposals discussed at the December 8, 2014 bargaining session were verbal, Cookson prepared a written summary of where the parties were as of that meeting, and he gave that written summary to Marshman at the start of their July 7 meeting. The summary tracked what the Company had previously verbally proposed, including what the Company was offering in exchange for eliminating retiree health benefits for "in-the-box" retirees. However, because the December 31, 2014 deadline had passed, the Company was now only offering that portion of its proposal that related to the retiree health benefits ending by December 31, 2015. Also, in the Company's Comprehensive Offer of Settlement, it proposed maintaining the current pension plan for existing employees, but moving to a cash-balance retirement savings account (or defined contribution benefit plan) for new employees hired in the future. Cookson reiterated the Company's desire to implement this for future new hires during his July 7 meeting with Marshman

The two went over Cookson's written summary. Marshman then countered, proposing that the Company keep retiree health benefits until the end of 2017, offer a 12-percent equity adjustment to wages, plus a 3-percent general wage increase, both at ratification, and no cash-balance retirement plans. Cookson responded, stating there was no way the Company could go beyond 2015 for retiree health care; that while the Company was interested in providing an equity adjustment, Marshman's proposed amount was too large; and that the Company had to have cash-balance retirement plans for new hires.

During this July 7 meeting, Cookson also informed Marshman that the Company was going to need to expand its earlier proposals regarding resource sharing and mobile maintenance. Resource sharing is an established procedure that allows the Company to send Bruce Mansfield employees to its other facilities to perform work. Mobile maintenance is a department of employees at one of the Company's other facilities who travel around to the Company's facilities to perform maintenance work. These employees have similar knowledge and skills as the unit maintenance employees, but perform the work at a lower cost. Cookson told Marshman he would be providing written proposals on expanded use of resource sharing and mobile maintenance at their next meeting.

Cookson and Marshman next met on July 21, 2015, at the Perkins Restaurant in Austintown, Ohio. At this meeting, Cookson handed Marshman a multipage document entitled "Summary of New Proposals and Revisions to 9/25/14 Company Comprehensive Proposal and 12/8/14 proposals provided to Union 7/21/15." (R. Exh. 2.) The Company continued to propose an end to "in-the-box" retiree health benefits, now to be effective October 31, 2015, as opposed to the previously proposed December 31 date, as that date had already passed. The Company, however, increased the equity adjustment from $.75 to $1 per hour for all classifications, effective at ratification, and it now offered a general wage increase of 5.5 percent at ratification and 2.0 percent 1 year after ratification. The Company maintained its earlier proposal to make $500/$1000 annual contributions into employees' HSA or 401(k) accounts to help employees save for their health care upon retirement, and it continued to propose having new hires (hired after January 1, 2016) be placed in a cash balance plan, as opposed to the Union's pension plan. Cookson also provided the Company's proposals addressing resource sharing and mobile maintenance.[17]

[17] Although the proposals and discussions over the increased use of non-unit mobile maintenance employees do not directly relate to the allegations in Case 06–CA–163303, they do provide context to the allegations in Case 06—CA–170901, involving subcontracting. In particular, these proposals sparked an exchange between Cookson and Marshman over the current and future size of the bargaining unit and the contracting out of unit work. (GC Exh. 9, pg. 4.) During this July 21 meeting, Marshman pointed out that the Company had not replaced the nearly 130 employees that had left the bargaining unit since 2008. Cookson did not deny this, stating that a reduced headcount through attrition would give the plant a chance to survive. Marshman replied that could not come at the expense of the Union, and that the Union would need some type of an agency fee arrangement and/or contingency plan for contractors who come to the Bruce Mansfield plant. Marshman stated that a lot can be negotiated between the Company and its contractors. But Marshman stated he could not knowingly or willingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." (GC Exh. 9, p. 4.) It was during this exchange that Cookson also informed Marshman that the Company planned to reduce another 40–50 employees from the unit,

Cookson went through the document, explaining the changes. Cookson testified about this meeting, and his meeting notes also were introduced into evidence. (GC Exh. 9.) Cookson's notes provide the most detail about what was discussed. On the issue of wages, Cookson explained to Marshman that, with the equity adjustments and the general wage increases, the Company was now proposing an 8.5-percent increase in wages upon ratification. Cookson emphasized the Company was not proposing any retroactive pay, and the wage increases would be effective at ratification, with the additional increases effective 1 year thereafter. Marshman did not respond to Cookson's comment about ratification.

Marshman responded that the retiree health benefits had to go until 2017; the Company needed to provide a means to compensate the current and future retirees for the loss of their health benefits; the Union was not going to agree to a cash balance plan; and the Union had issues with the Company's proposals regarding resource sharing and mobile maintenance. Cookson asked Marshman to take the proposal to the Union's bargaining committee to review. The two agreed to meet again on August 20, 2015, at the same location.

On August 20, 2015, Cookson and Marshman met as scheduled. Cookson's notes from this meeting again provide the most detail about what was discussed. (GC Exh. 9.) According to the notes, Cookson began with where the parties stood, noting that they left the July 21 meeting with clear disagreements on the following: (1) ending health benefits for in-the-box retirees (the Company proposed ending it as of 10/31/15, and the Union would not accept unless coverage went until 2017); (2) cash balance pension plan for new hires (the Company proposed, and the Union rejected); and (3) making $500/$1000 annual contributions to HSA/401(k) accounts (the Union wanted contributions to for retirees as well, and the Company only was willing to do it for active employees). Cookson then stated that the Company could move on the term of the agreement and still had room to move in the wage area. Marshman responded that retiree health care has a monetary value, and that the Company should provide the savings from the termination of this benefit to the retirees. Cookson's notes reflect he (CC) and Marshman (HM) had the following exchange regarding the termination of health benefits for "in-the-box" retirees:

> (CC) Our position is that it (the box) will end and go away. We are proposing to give $$ to the active employees. We have a fundamental disagreement. We are eliminating this across the board.
> (HM) Not trying to be unreasonable, this is not favorable to us. If I could get something, we could move on.
> (CC) In this area I cannot do any more than I have already offered.
> (HM) How do we get around this?
> (CC) We have offered other things—like an initial 8.5% wage increase.

primarily in the mechanical and electrical departments. [At the hearing, Cookson estimated that in the last 5 years the unit has gone from 275–300 employees to 230 employees, and the unit size has been steadily declining every year.] (Tr. 189–190.)

(GC Exh. 9.)

The two discussed the Company's other proposals, including resource sharing and the mobile maintenance department. In the end, they agreed they were not near an agreement and the parties should return to the bargaining table with their full committees. They agreed to resume bargaining on September 17 and 18, 2015.

4. The September 17–18 bargaining sessions

The parties' committees met on September 17 and 18, at the Radisson Hotel in Beaver Falls, Pennsylvania. At the September 17 session, the Company gave the Union its "Second Comprehensive Offer of Settlement." The document was a redlined version of the parties' collective-bargaining agreement with the revisions Cookson had presented to Marshman during their one-on-one meetings. There were no substantive changes. The parties discussed the Company's offer, and the Union's response remained essentially the same. The Union never presented this Second Comprehensive Offer of Settlement to its members for ratification.

At the September 18 session, the parties focused on the use of the Company's mobile maintenance department and the use of contractors. The Union gave the Company a counterproposal regarding the Company's use of outside contractors. The Union sought to revise the language in Article IV, addressing Management Responsibilities, to prohibit the use of contractors if it deprived unit employees of overtime work. The Company considered and rejected the Union's proposal. The parties ended the September 18 session apart on several key issues, including, wages, retiree health care, cash balance pension plans, mobile maintenance, and resource sharing. The parties scheduled another bargaining session for October 19, 2015. The Union later cancelled the meeting because Marshman was unable to attend due to an illness, and Marshman was unwilling to have negotiations continue without him. The Company requested alternate dates, but the Union provided none.

Thereafter, Company internally concluded that the parties were at impasse. Without further bargaining sessions scheduled, the Company decided to implement certain terms from its Second Comprehensive Offer of Settlement.

5. Announced partial implementation

On October 27, 2015, Cookson and other Company representatives met with Union representatives following a scheduled labor-management meeting. Cookson explained to the Union representatives that the parties were at impasse and the Company was implementing certain terms from its Second Comprehensive Offer of Settlement. Cookson provided written documents explaining what proposals the Company was implementing. Among the implemented terms, the Company was ending retiree health subsidies for all in-the-box retirees by December 31, 2015; it would begin making annual contributions for current employees of $500/$1000 (depending on the type of health insurance coverage) toward Health Savings Accounts (or 401(k) account if no Health Savings Accounts) beginning in 2016; and all employees hired or rehired on or after January 1, 2016, would participate in the Company's cash bal-

ance retirement plan (and not in the existing pension plan).[18] Cookson handed the Union a package of documents related to the impasse and the implemented terms. One of the documents the Company gave the Union was entitled "Summary of Implemented Terms." This document states the following regarding the Company's proposed increases to wages and shift differentials:

> Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates only effective upon ratification of the contract by membership
>
> Equity adjustment-one dollar per hour increase applied to all wages in effect July 1, 2015, only upon Ratification
> Effective the date of ratification, a General Wage Increase of five and one half percent (5.5%) will be granted on the wage rates in effect after equity adjustments
> Effective one year following the date of ratification, a General Wage Increase of two percent (2.0%)
> Upon ratification, increase Sunday Shift Premium to Two Dollars Five Cents ($2.05) per hour, Afternoon Shift Premium to One Dollar Fifty ($1.50) per hour, Night Shift Premium to One Dollar Fifty Five ($1.55) per hour.

As previously stated, the General Counsel and Respondent stipulated that the parties were at impasse as of October 27, 2015.

B. 06–CA–17901

1. Background

As previously stated, the Bruce Mansfield facility has three identical power-generating units: Unit 1, Unit 2, and Unit 3. Each unit consists of a turbine, a generator, a boiler pump, valves, and other auxiliary equipment. The Company shuts down a unit for periodic maintenance, which is referred to as a scheduled outage. A full-train overhaul is a larger scale outage that includes opening and disassembling the entire turbine-generator unit, inspecting and cleaning the parts, and then reassembling and closing the unit.[19] The bargaining unit employees at Bruce Mansfield historically have performed all the open/clean/close work. (Tr. 47–48.) The Company has contracted out certain specialized work, such as engineering, sandblasting, coating, painting, insulation, pipefitting, nondestructive testing, etc.

2. M116 Outage

In the spring 2016, the Company performed a full-train overhaul of Unit 1. This type of outage occurs approximately every 9 years. This particular outage involved nearly 600 tasks.[20] Christopher Cox, Respondent's Maintenance Manager, testified the Company internally evaluated the project and determined, after consulting with the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), that it could complete the project within 56 days. (Tr. 203–204.) The project was referred to as M116, because it involved Unit 1 at the Bruce Mansfield facility in 2016.

Planning for this particular outage began back in January 2015, when the Company's higher-level managers met to begin discussing the project. One of the topics discussed was who should perform the open/clean/close work. The Company's higher-level managers considered the following three alternatives: (1) have the work performed by bargaining-unit maintenance employees; (2) have the work performed by the Company's mobile maintenance department; or (3) have the work performed by outside contractors. According to internal emails, these managers concluded there were not enough available unit maintenance employees to perform the open/clean/close labor for a full-train turbine outage, while still performing the day-to-day maintenance work on the other two units and related equipment. The managers considered having the mobile maintenance employees perform the open/clean/close work, but the Company's industrial relations department believed it "would be too risky to use [mobile maintenance] in that capacity because the [turbine/generator] work was always performed in house and using [mobile maintenance] at this time would jeopardize ongoing negotiations with the [U]nion." (GC Exh. 12.) Ultimately, the managers focused on subcontracting out the work. There is no dispute the Company never involved the Union in this decision-making process.

The Company contacted General Electric ("GE") in early 2015 to request its bid to perform the M116 open/clean/close work. The Company contacted GE because GE originally manufactured the turbine generator units, and the Company continued to use GE to provide technical direction during outages. Additionally, GE provides a two-year warranty on any work it performs for the Company. GE provided warranties for work performed during prior outages.

In late February 2015, GE provided the Company with its bid to perform the work. Over the next several months, the Company had ongoing discussions with GE about its bid to perform the work. Christopher Cox was involved in overseeing the M116 project, making sure that it was executed on budget, on time, and safely. He testified that by about September 10, 2015, the Company made the decision and received approval to have GE perform the work at issue. Cox worked with GE over the next month or so on additional proposals to try to reduce the costs for the Company.[21] (Tr. 204–205.) On around November 13,

[18] Respondent did (not) implement other proposals from its Second Comprehensive Offer of Settlement. It is unnecessary to discuss them as they are irrelevant to deciding the matters at issue.

[19] Throughout the hearing, various terms were used to describe this work, including, but not limited to, the open/clean/close work, the turbine/generator overhaul, the turbine rebuild, the turbine outage, etc.

[20] The General Counsel introduced an internal report identifying each task performed during the outage, as well as the estimated man hours it would take to complete the each task. (GC Exh. 2.) The General Counsel presented two witnesses who testified that approximately 140-150 of the tasks were previously performed by unit employees. (Tr. 70–71)(Tr. 100–101.)

[21] At the hearing, Cox testified that the labor costs were actually more to use GE to perform the work at issue. (Tr. 205.) Cox provided no explanation or basis for his statement. The Company also did not introduce any documentary evidence to support or explain his statement.

2015, the Company entered into a purchase order to have GE perform the open/clean/close work on Unit 1. (GC Exh. 17.) There is no dispute that the Company did not inform the Union that it contracted with GE to perform this work until February 10, 2016.

Article IV of the parties' expired collective-bargaining agreement contained the management rights provision, which addressed subcontracting. It stated, in pertinent part, that:

> It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contracting would result in layoff or demotion of employees or the reduction of hours of work below forty (40) hours per week. Except in emergencies, the parties agree to meet prior to contracting work out and discuss the scope of the work (as to description, location, and estimated duration) involved, and the portion, if any, to be performed by bargaining unit employees.

As part of this process, the Company faxed the Union a weekly spreadsheet report with the work the Company has assigned (on an emergency basis) or may assign to outside contractors. The Company continued this practice after the parties' agreement and extension both expired. The Company faxed the Union these reports on Friday, and then parties meet the following Wednesday at a contractors' meeting to discuss the work at issue.

Respondent introduced 10 of these weekly spreadsheet reports, covering certain weeks from June 5, 2015, through November 20, 2015 (specifically, the reports were for 2/6/15, 6/5/15, 7/7/15, 9/4/15, 9/18/15, 9/28/15, 10/2/15, 10/9/15, 11/6/15, and 11/20/15). Some of these reports refer to M116. Some identify the subcontractor and the type of work being performed. However, only two refer to M116 and turbine or generator. (R. Exh. 5.) The first is the June 5, 2015 report, which indicates Thomas Cowher, a higher-level consultant for the Company, requested a contractor for a job described as "Turbine Area General NDE M116." Christopher Cox testified that "NDE" stands for non-destructive examination. Non-destructive examination refers to when the turbine is apart and on the floor, and there is ultrasonic testing to inspect the area for cracks and erosion. Cox confirmed that bargaining unit employees do not perform this non-destructive testing. (Tr. 212–213.) The second is the November 6, 2015 report, which indicates that Thomas Cowher requested a contractor for a job described as "Generator labor M116." (R. Exh. 12.) Neither entry provides any additional information about the nature or scope of the project, when it was going to be performed, and/or who was going to perform it. None of the witnesses present for these weekly meetings could recall any discussions about the subcontracting of the open/clean/close work or the turbine/generator outage work for Unit 1.

The Company holds periodic "all hands" meetings with maintenance department employees. On June 15, 2015, the Company held "all hands" meetings for each of the shifts in which the M116 outage was raised. The Company gave a power-point presentation that generally addressed the outage. Only one of the witnesses, Devin Miller, a senior engineer consultant for Respondent, testified about the meeting, and he could not offer any specifics about what details were shared with employees. Miller confirmed that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. (Tr. 271.)

On January 11, 2016, the Company held a managerial meeting with its outage planners. No Union representative was present for this meeting. At this meeting, there was a power-point presentation, and one of the slides read, "Turbine-Generator Labor. GE will provide project management, supervision and craft labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract. Final approval for the GE PO [Purchase Order] was received on 11/12/15. Project team will start planning and scheduling as soon as GE receives the PO." (GC Exh. 3.)

On February 10, 2016, the Company held a contractors information meeting with the Union. At this meeting, Paul Rundt, the Maintenance Superintendent, and Christopher Cox met with union representatives to inform them that the Company had contracted out the open/clean/close work to GE. Dennis Bloom, the Union recording secretary, and Frank Snyder, Union steward, were present for the meeting. Bloom testified that Rundt identified each of the jobs and which contractor was going to be performing the work. Specifically, Rundt stated that the Unit 1 turbine outage work was going to be given to GE. Rundt stated the Unit 1 boiler feed pump work may also go to GE. Bloom responded that the mechanical maintenance employees had performed the outage work in the past, and that it should be done by the unit employees. Rundt replied that the outage work was going to be contracted out to GE.[22] Rundt, however, left open the issue of who would perform the boiler feed pump work, stating that he would check into it and get back to the Union. (Tr. 64–65.) Snyder then requested the contractor information sheets, which would list the contractor, the particular tasks, the estimated man hours, and the estimated costs. As for the costs, Bloom testified Cox responded that the information was proprietary, that the Union was not entitled to that, and the information was not available. (Tr. 66–67.) Cox did not recall any request for information being made during this meeting. (Tr. 226.) Following the meeting, the Company

[22] Cox and Rundt both testified that Rundt informed the Union that the Company "was intending" to contract out the turbine outage work and auxiliary equipment work, including the boiler feed pump work, to GE. I do not credit that Rundt said the Company "was intending" to subcontract out the turbine outage work to GE. I find the Company had already made that decision, and it was final. The Company made the decision to subcontract this work in early 2015. It solicited and received GE's bid in the early spring of 2015. Cox testified the Company made the final decision to subcontract this work to GE on around September 10, 2015, and he continued to negotiate with GE for several more weeks to try to further reduce the cost to the Company. On November 13, 2015, the Company and GE entered into a purchase order to perform the work. At the January 11, 2016 outage readiness meeting, the Company informed managers that it had contracted with GE to perform the "labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract." In light of these circumstances, I credit Bloom's testimony that the Company presented its decision to subcontract the turbine outage work to GE as a final decision.

decided to have the unit employees perform the boiler feed pump work, and Rundt informed the Union of this decision.

3. Information request

Later, Bloom reported to Marshman what had occurred at this meeting. Thereafter, Marshman sent the Company a letter dated February 10, 2016, requesting information. The letter, in pertinent part, stated:

> This is a reaffirmation letter of the company's obligation to provide all information, upon request by Local 272, for contractors working at the Bruce Mansfield Plant. This would include:
>
> • Name
> • Number of employees
> • Estimated man/hours
> • Wages
> • Material costs
>
> (But not limited to).
>
> This letter is also a formal request for all information from paragraph above for the Unit One Outage.

In a letter dated March 14, 2016, Christopher Cox, the Maintenance Manager, responded to Marshman's information request, providing the Union with a three-page chart containing the work order number for the contracted-out job, the abbreviation for the contractor's name on the order, a short description of the work the contractor was to perform, and the estimated number of man-hours to perform the work described. The Company did not provide the wages the contractor paid to the individuals performing the work or the material costs. There is no mention of this information in the Company's response, and no explanation as to why the information was not being provided to the Union.

Marshman testified that after receiving Cox's March 14 letter he called Cox to tell him the response was insufficient. Marshman testified that he complained to Cox about not receiving the requested wage and material cost information. Marshman testified that he kind of gave Cox a summary why the Union needed it, stating that if the Union was going to try to negotiate the work that was performed, it "would need to know apples to apples" of what it was negotiating. (Tr. 124–125.)[23] The Company never provided the requested wage or material cost information, did not inform the Union that it was not going to provide it, or explain why it was not going to provide it. (Tr. 246–248).

The Unit 1 scheduled outage lasted from around March 20, 2016, through May 14, 2016. GE performed the open/clean/close work on the turbine-generator unit. There were no unit employees were involved in this turbine overhaul work. (Tr. 201.) The bargaining unit employees performed the boiler feed pump work. During this period of time, all available bargaining unit employees worked, including voluntary and involuntary overtime. Some of the unit employees turned down opportunities to work overtime.

V. LEGAL ANALYSIS

1. Did Respondent violate Section 8(a)(5) and (1) of the Act when it failed to also implement its proposed increases to wages and shift differentials from its final, pre-impasse offer while implementing other proposals from that same offer

The General Counsel contends Respondent violated Sections 8(a)(5) and (1) of the Act when, after the parties reached an impasse, it failed to implement its proposed increases to wages and shift differentials when it eliminated "in-the-box" retiree health benefits.[24] It is well-established that after the parties reach a good-faith impasse during contract negotiations, an employer may unilaterally implement changes to existing terms and conditions of employment provided those changes are "reasonably comprehended" within the employer's pre-impasse proposal to the union. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1976), enfd. 395 F.2d 622 (D.C. Cir. 1968). See also *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1978) (implemented terms cannot be "significantly different" than those proposed to and rejected by the union). Moreover, an employer is not required to implement all aspects of its final, preimpasse offer, but may choose to implement portions of it. *Presto Casting Co.*, 262 NLRB 346, 354 (1982) (unilateral raises that encompassed automatic progressions and merit increases held reasonably comprehended in pre-impasse proposals on merit wages even though employer gave higher wages and increased wages for a larger portion of employees than in the past). See also *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973)), enfd in relevant part, 708 F.2d 495 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983); *Emhart Indus. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990). The Board, however, has held that an employer cannot selectively implement proposals that are "inextricably intertwined" with unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 588 (1992); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006).

In *Plainville Ready Mix*, supra, the employer proposed during contract negotiations to change the wage structure and health insurance plan offered to employees. As for wages, the

[23] Marshman could not recall if he initially spoke with Cox or left him a voicemail message, but he did have this conversation with Cox about the Company's response. Cox testified that he does not recall any further communication with Marshman about this information request. (Tr. 228.) But Cox did recall having conversations with Marshman in the past on the topic of obtaining information from subcontractors, and that Respondent informed Marshman this information is proprietary to the subcontractor, and Respondent will not provide it. (Tr. 248–249.) I credit Marshman's specific recollection of telling Cox that he (Marshman) needed the requested information for negotiations and he needed to know "apples to apples" of what he was negotiating.

[24] Par. 12 of the complaint in Case 06–C–163303 alleges that Respondent violated Secs. 8(a)(5) and (1) of the Act when it "failed to implement the wage adjustments and shift differential proposals contained in its [Second Comprehensive Offer of Settlement] notwithstanding that it implemented the remaining terms from that proposal." As previously established Respondent implemented some but not all of the proposals from its Second Comprehensive Offer of Settlement. In its posthearing brief, the General Counsel made clear that it was alleging that Respondent violated Secs. 8(a)(5) and (1) of the Act when it failed to implement the general wage increases, equity adjustments, and shift differentials when it eliminated health benefits for "in-the-box" retirees. (GC Br. 23.)

employer proposed to lower fixed hourly wage rates but introduced gain sharing and incentive pay plans to help employees make up the difference. The union rejected the proposal. In its final pre-impasse offer, the employer offered to withdraw the gain sharing and incentive pay plans and, instead, offer a higher fixed hourly wage rate. However, after reaching impasse, the employer did not implement the higher hourly wage rate or the gain sharing or incentive pay plans; it simply implemented the lower fixed hourly wage rates. The Board adopted the administrative law judge's finding that the employer violated the Act by doing so, holding that the lower wage rate was not reasonably comprehended in the employer's final offer because the lower hourly wage rate was presented as part of a package with the gain sharing and the incentive pay plans—it was not offered as a stand-alone proposal.

As for health insurance, the employer proposed a new plan that limited certain covered benefits, such as drug and alcohol treatment and psychological treatment, and it increased the employees' premiums, deductibles, and copays. But the new plan also added benefits, such as vision care, emergency care, and a prescription drug card. After reaching impasse, the employer partially implemented the proposed health insurance plan, without the added benefits. The Board adopted the judge's finding that the employer violated the Act when it implemented the proposed plan without the added benefits, stating that, "the plan was presented as a health insurance plan; that the elements of the plan do bear an economic and functional relationship to each other; and that to implement only parts of the plan, a fortiori those parts of the plan principally detrimental to the employees, is an unlawful implementation …" See id. at 585.

In *Cleveland Cinemas Management Co.*, supra, the successor employer acquired a movie theater that employed union-represented projectionists. During negotiations, the successor employer informed the union that it wanted to eliminate the dedicated projectionist positions and have that work performed by supervisors. The union objected. The employer then offered to enter into a service technician agreement which would have two of the projectionists working fulltime covering all three of the employer's area theaters in exchange for eliminating the dedicated projectionist positions. The union rejected this proposal, stating it wanted both the dedicated projectionist positions and the service technician agreement. The employer was unwilling to do this, and it gave the union its written proposal regarding the service technician agreement. Thereafter, the parties reached an impasse, and the employer partially implemented its final offer. The employer eliminated the dedicated projectionist positions and had that work performed by supervisors, but it did not implement the proposed service technician agreement. Applying *Plainville Ready Mix*, the Board adopted the judge's finding that the employer violated the Act by failing to implement the proposed service technician agreement, holding that it was presented to the Union in its final, pre-impasse offer as a "quid pro quo" for the union giving up the dedicated projectionist positions.

Here, the General Counsel relies upon the "inextricably intertwined" theory to support his position that Respondent was obligated to also implement the proposed increases to wages and shift differentials contained in its Second Comprehensive Offer of Settlement because they were presented as part of an overall package to compensate the Union for the elimination of "in-the-box" retiree health benefits.[25] I agree. I find that from December 8, 2014 forward, Respondent proposed the wage increases at issue, as well as annual contributions into employees' HSA or 401(k) accounts, as a quid pro quo for the elimination of "in-the-box" retiree health benefits.[26] There is no dispute that Respondent's December 8 oral proposal directly tied the wage increases to the elimination of the "in-the-box" retiree health benefits. (Tr. 162–163.) Also, it was during this December 8 bargaining session when Marshman asked how much of the savings from the elimination of these retiree health benefits was the Company willing to share with the Union, Cookson responded that the Company would save $1.25 million a year by ending the benefits by the end of 2014, and that the Company's oral proposal to the Union would cost it $1 million a year. When Marshman continued to assert that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson responded that he had already explained how the Company's oral proposal was offering the Union back 80 percent of the savings from the elimination of those benefits.

The Company continued to tie the proposed wage increases to the elimination of the "in-the-box" retiree health benefits when Cookson met one-on-one with Marshman in July and August 2015. At the July 7, 2015 meeting, Cookson reduced the Company's December 8 oral proposal to writing. At the July 21, 2015 meeting, the Company increased the equity adjustment portion of its proposal from $.75 an hour to $1 an hour, but the quid pro quo nature of the proposal remained the same.[27] Cookson pointed out to Marshman at this July 21 meeting that the Company was now proposing an 8.5 percent wage increase, consisting of the combined 7.5 percent general wage increases and the $1 per hour equity adjustment. At their August 20, 2015 meeting, when Marshman continued to chal-

[25] Respondent did implement its proposal to make annual contributions to the employees' HSA or 401(k) accounts as set forth in its Second Comprehensive Offer of Settlement.

[26] The term "proposed wage increases" as used in this Decision encompasses the proposed equity adjustments, general wage increases, and shift differentials referred to in the Company's Second Comprehensive Offer of Settlement.

[27] At the hearing, Cookson confirmed the December 8 oral proposal tied the wage increases to the elimination of the "in-the-box" retiree health benefits, and those increases were higher if the Union agreed to eliminate the benefits by the end 2014, as opposed to the end of 2015. However, he claims the Company abandoned its proposal tying the wage increases to the elimination of the retiree health benefits after the December 31, 2014 deadline passed. (Tr. 137–138.) I do not credit this testimony. Although the proposed incentive to get the Union to agree to end the benefits by the end of 2014 went away with the passage of time, the proposals and discussions continued to tie the wage proposals and elimination of retiree health benefits together. The Company never withdrew its proposal, and it never informed the Union that it was no longer proposing the wage increases and annual contributions to employees' HSA or 401(k) accounts to compensate for the elimination of the retiree health benefits. On the contrary, as previously stated, Cookson continued to make statements showing that the proposals were related when he met with Marshman one-on-one in July and August 2015.

lenge that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson pointed out that the Company was offering an 8.5 percent increase in wages if the retiree health benefits ended in 2015.

When the parties met again for bargaining on September 17 and 18, 2015, there is no dispute that the Company made the same package proposal to the Union that Cookson had presented to Marshman. The Company never modified its proposal as it related to increases to wages and shift differentials and the elimination of retiree health benefits, and it never informed the Union that it would eliminate retiree health benefits without implementing the proposed increases. It was not until October 27, 2015, when Respondent announced it was implementing portions of its Second Comprehensive Offer of Settlement, that the Union learned Respondent was not also implementing the proposed increases to wages or shift differentials.

In its posthearing brief, Respondent initially contended its wage proposals were not linked to any other aspect of its proposal, but a sentence later Respondent claimed that, if anything, its proposals were in response to the Union's stated concerns over the wage gap between the Bruce Mansfield facility and the Sammis facility. (R. Br. 28).[28] I reject this contention, largely because it is contrary to the overwhelming evidence, including the express language in the Company's oral and written proposals, which, as previously stated, directly tied the wage proposals to the elimination of the "in-the-box" retiree health benefits. While Respondent's wage proposals included an equity adjustment, in the form of a flat dollar amount, it was only one aspect of its overall quid pro quo proposal. Another aspect of the proposal was the general wage increase (GWI), which was in the form of percentage increases. If Respondent's wage proposal was limited to bridging the wage gap between the two facilities, it is unclear why it needed to distinguish between an equity adjustment and a general wage increase when it submitted its proposal.

Moreover, while it is true Marshman and the Union complained that the Company was not offering enough to equalize the wages between the two facilities, Marshman never abandoned the Union's position that the Company was not offering enough to compensate for the elimination of the "in-the-box" retiree health benefits. And, as previously stated, when Cookson and Marshman met on August 20, 2015, and Marshman continued to complain that the Company was not offering enough, Cookson responded that the Company was offering the Union an 8.5 percent wage increase. In other words, while the parties discussed the equity adjustments, it was never in isolation or at the exclusion of the other aspects of Respondent's integrated proposal. And when the Union rejected the Company's Second Comprehensive Offer of Settlement, it did so because it objected to several of the Offer's provisions, including aspects of Respondent's quid pro quo proposal. (Tr. 179–181.)

Contrary to Respondent's contentions, I find it proposed an integrated package, which consisted of an equity adjustment, the general wage increases, the shift differentials, and the annual contributions to the employees' HSA or 401(k) accounts, as a quid pro quo for the elimination "in-the-box" retiree health benefits. The fact that the proposal included an aspect that also helped bridge the wage gap between the two facilities does not alter this conclusion, because a proposed wage increase certainly can, and in this case did, serve two objectives.

Accordingly, I find that by implementing the elimination of "in-the-box" retiree health benefits without implementing the general wage increases, the equity adjustments, and the shift differentials, Respondent implemented a change in terms and conditions of employment not contemplated in its Second Comprehensive Offer of Settlement. Respondent either could have maintained the "in-the-box" retiree health benefits or implemented the proposed increases to wages and shift differentials.

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the wage adjustments and shift differentials on contract ratification

The General Counsel's second argument is that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases upon contract ratification. Contract ratification is a permissive subject of bargaining, and a party may not insist to impasse or condition negotiations or overall agreement on ratification. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958). Requiring ratification substantially modifies or weakens the independence of the representative chosen by the employees by enabling the employer, in effect, to deal with its employees rather than with their statutory representative. Id. at 350. It is because "employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs … it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives." *New Process Steel*, 353 NLRB 111, 114 (2008), revd on other grounds 560 U.S. 674 (2010) (quoting *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 226 (1991) (Chairman Stephens concurring)). Thus, the Board requires the parties have an express agreement to make ratification a condition precedent, and that such an agreement "is not established casually or equivocally." Id. at 114–115. Absent evidence of such an agreement, the union retains sole discretion over whether to ratify the contract or not. Id.

Respondent argues that it repeatedly indicated in its proposals that increases to wages and shift differentials would be effective upon ratification, and the Union did not object or request to bargain over the ratification language. I do not find that constitutes an express agreement binding on the Union.[29]

[28] In its posthearing brief, Respondent addressed arguments it anticipated the General Counsel might make as to how or to what it (Respondent) tied these wage increases to when making its proposals. For example, Respondent anticipated the General Counsel might argue the wage proposals were tied to new productivity standards and/or new work rules. (R. Br. 30–33.) Respondent curiously does not address the argument that the wage proposals were exchange for the elimination of the retiree health benefits.

[29] In its posthearing brief, Respondent claims that it never actually required contract ratification as a condition precedent to paying the increases, and that its use of the phrase "contract ratification" was "merely a proxy" for when the parties reached an agreement, and the

Beatrice/Hunt-Wesson, Inc., supra. Absent such an agreement, Respondent violated the Act when it conditioned implementation of the proposed wage increases on contract ratification.

In its defense, Respondent argues that under Board law it is not unlawful to combine mandatory and permissive bargaining subjects in a proposal, so long as the employer does not insist to impasse on the permissive bargaining subjects. While generally accurate, I find Respondent did, in fact, unlawfully insist on contract ratification when it implemented portions of its pre-impasse offer but withheld the inextricably intertwined wage increases, and then informed the Union and the employees in its October 27, 2015 correspondence that those increases would only be implemented upon contract ratification.

Respondent cites to *White Cap, Inc.*, 325 NLRB 1166 (1989), enfd 206 F.3d 22 (D.C. Cir. 2000), as supporting its position. In that case, the employer and union negotiated an agreement, but the employees failed to ratify it. The employer offered monetary incentives to facilitate ratification, but the employees again voted it down. The employer again proposed the added incentives but warned the union that they would be withdrawn if the employees again failed to ratify the agreement within a set time period. When the employees again failed to ratify, the employer followed through and withdrew the added incentives from its offer. A charge was filed, and the Board found that employer acted lawfully.

Respondent argues that if it is lawful to threaten to withdraw—and actually withdraw—wage proposals based upon a union's failure to ratify a new agreement, an employer does not commit an unfair labor practice by timing its wage proposals to coincide with ratification. Respondent further argues that its non-implementation of the wage proposals was an inducement to convince the Union to finalize a new agreement. I reject these arguments. In *White Cap*, the employer was transparent when it informed the union that it was only offering the added incentives as an inducement to get the employees to timely ratify the agreement, and that it would withdraw those incentives if the employees failed to do so. In this case, Respondent never indicated to the Union prior to or when it submitted its Second Comprehensive Offer of Settlement that it would eliminate "in-the-box" retiree health benefits without also implementing the proposed wage increases. Moreover, *White Cap, Inc.* involved the withdrawal of proposed monetary incentives unrelated to any other proposals. In the present case, Respondent proposed the wage increases part of a quid pro quo package to compensate for the elimination of the "in-the-box" retiree health benefits, and, as previously explained, it became obligated to implement those increases when it eliminated the retiree health benefits.

Respondent also argues it was merely abiding by its understanding as to the Union's established practice of submitting agreements to its members for ratification. I reject this argument as well. First, Board law requires the parties have an express agreement on ratification, and there was no such agreement in this case. Second, the parties reached an impasse, not an agreement. As such, there was nothing for the members to ratify. Finally, there is no evidence that this type of situation has happened before, so Respondent has no basis for asserting that it was simply abiding by the Union's established policy or practice when it required ratification.[30]

Based on the foregoing, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases on contract ratification.

3. Did Respondent violate Section 8(a)(5) and (1) of the Act when it subcontracted the outage maintenance work on Unit 1 without providing the Union with notice or an opportunity to bargain over the decision

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it subcontracted out bargaining unit work associated with the Unit 1 outage without providing the Union with notice or an opportunity to bargain. Section 8(d) requires that the parties meet at reasonable times and confer in good faith regarding wages, hours, and terms and conditions of employment. An employer violates Section 8(a)(5) when, without consulting the union, it unilaterally institutes changes in mandatory terms of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In general, good-faith bargaining requires the employer provide timely notice and a meaningful opportunity to bargain over the change at issue. See *First National Maintenance*, 452 U.S. 666, 682 (1981). Once notice is given, the union must request bargaining with due diligence or else it waives bargaining. *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). In general, if notice is given too short a time before implementation of the change, that is, without time for meaningful bargaining to take place, the notice is nothing more than announcement of a fait accompli. *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004). The same is true when an employer has no intention of changing its mind. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). When faced with a fait accompli, a union cannot be held to have waived bargaining. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

It is well established that a decision to subcontract unit work is a mandatory subject of bargaining where the employer is merely replacing employees in the bargaining unit with employees of a contractor to do the same work under similar working conditions. *Fibreboard Paper Products Corp. v.*

intent was that the increases would be effective the same time as the new agreement was reached. (R. Br. 33–34.) Respondent presented no evidence the Union or employees shared this understanding of the use of the term "contract ratification." Moreover, I find Respondent's claim to be disingenuous in light of the fact it distributed a document to the Union and employees on October 27, 2015, entitled "Summary of Implemented Terms" which specifically states, "Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates *only effective upon ratification of the contract by membership*." (Jt. Exh. 8, p. 2.) (emphasis added).

[30] When the parties extended their collective-bargaining agreement to February 15, 2014, they made certain modifications. The Union did not submit the extension for ratification because it was not considered a new agreement. Cookson acknowledged he was made aware of this fact at or around the time of the extension. Respondent, therefore, was aware the Union does not require ratification of when something less than a new agreement is involved.

NLRB, 379 U.S. 203, 215 (1964). See also *Mi Pueblo Foods*, 360 NLRB 1097 (2014); *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644–647 (2011); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 467–469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005); *Torrington Industries*, 307 NLRB 809, 810–811 (1992).[31]

Here, Respondent subcontracted work historically performed by bargaining unit employees without first bargaining with the Union. Respondent, however, contends that it had no obligation to bargain because the decision to subcontract was not based on labor costs.[32] Respondent contends it subcontracted the work to GE because there were not enough unit employees available to perform the work at issue within the timeframe set to complete the project. Additionally, Respondent argues that it had no obligation to bargain because subcontracting the work to GE did not result in any material change or detrimental impact for any of the unit employees. Specifically, Respondent contends no unit employee lost work and, in fact, employees worked or were offered (and some refused) extensive overtime during the outage. Finally, Respondent contends that its decision to subcontract to GE was based, in part, on the fact that GE offered a warranty on the work it performed.

For the reasons stated below, I find Respondent had a duty to bargain, and that the decision to subcontract was based, at least in part, on labor costs.

I find the Board's decision in *Mi Pueblo Foods*, 360 NLRB 1097 (2014), particularly instructive and applicable in response to Respondent's arguments. In that case, the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The judge found no violation because no unit drivers were laid off and the drivers' wages and hours were not significantly affected. The Board reversed, holding that bargaining is not excused simply because there was no evidence of immediate impact on the employees' terms and conditions of employment. The Board held that whenever bargaining unit work is assigned to outside contractors, the bargaining unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer "could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion's bargaining strength." 360 NLRB at 1099. In reaching this conclusion, the Board cited to its decision in *Overnite Transportation, Co*., 330 NLRB 1275 (2000), affd. in part, reversed in part mem. 248 F.3d 1131 (3d Cir. 2000), in which it held that the employer had an obligation to bargain even though the subcontracting involved an influx of new work that unit employees could not handle, and where none of the unit employees lost any work. In so finding, the Board in *Overnite Transportation* held:

> At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.

330 NLRB at 1276.

The Board reached similar conclusions in *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702–703 (2006). In both cases, the Board concluded that even absent an affirmative showing that subcontracting caused the layoff or job loss of current employees, issues amenable to the collective-bargaining process remained, such as the adjustment of unit employees' workloads or the reemployment of terminated bargaining unit members. In *Mi Pueblo Foods*, the Board noted another possible topic for negotiation with the union was expanding the bargaining unit. 360 NLRB at 1099.

Respondent claims it had no obligation to bargain because the decision to subcontract was not based on labor costs, but rather on its need to get the project completed within the established time frame, and it would not be able to do so using unit employees.[33] However, as the cases cited above make clear,

[31] In *Torrington Industries*, the Board noted that while there may be non-labor cost reasons for subcontracting that may provide a basis for concluding the decision to subcontract is not a mandatory subject of bargaining, the employer's reason for subcontracting must implicate a matter of core entrepreneurial concern defined by a fundamental change is the "scope and direction" of its business, which would then trigger a balancing of the sort described in *First National Maintenance Corp.* 307 NLRB at 811. There is no contention the subcontracting at issue amounted to a core entrepreneurial decision or involved a fundamental change in the scope or direction of Respondent's business.

[32] Respondent also argues it had no obligation to bargain because it was actually more expensive to subcontract the work to GE than it would have been to have the unit employees perform it. Respondent's only support for this is the testimony of Christopher Cox, who was asked on direct examination whether labor costs played a role in the decision to use GE to perform the work, and he replied "labor costs are actually more for GE." (Tr. 205–206.) Cox provided no explanation or support for this statement, and Respondent offered nothing more. I find Cox's single, conclusory statement insufficient to prove that it was, in fact, more expensive to subcontract the work to GE.

[33] In its posthearing brief, Respondent argues its decision to subcontract was motivated by its concerns about completing the work within "the tight timeframe mandated by the PJM Interconnection." (R. Br. 43). Cox, however, testified the Company was involved in setting the "internal benchmark" for how long it would take to complete the outage. Then, based on the information it received from PJM, including how long comparable outages took, the Company reported to that PJM that it could complete the project within the 56-day timeframe. (Tr. 203–204.) In light of this evidence, I find it misleading for Respondent

that does not authorize Respondent's unilateral action--the Board still imposes a duty to bargain in those situations.

The same is true regarding Respondent's claim that it did not have an obligation to bargain because no unit employee experienced a reduction in hours or loss of overtime opportunity as a result of the subcontracting. As the Board held in *Overnite Transportation* and *Mi Pueblo Foods*, evidence of an immediate impact on employees' terms and conditions of employment is not required. The duty to bargain is triggered by concern that the subcontracting could potentially affect the size of the unit or dilute the union's strength. In this case, these are not hypothetical concerns. During negotiations, Respondent raised concerns over the profitability of the Bruce Mansfield facility and the need to reduce labor costs, which included the need to reduce the size of the bargaining unit. Respondent also proposed changes, including the increased use of mobile maintenance employees, which would allow it to increase the amount of unit work it could assign to nonunit employees. Cookson and Marshman discussed these matters during their July 21, 2015 meeting. It was in this meeting that Marshman raised concerns over the dwindling size of the bargaining unit, noting that Respondent had not replaced the nearly 130 employees that had left the unit since 2008. Cookson replied that a reduced headcount through attrition would give the plant a chance to survive, and he added that the Company planned to reduce another 40-50 employees from the unit, primarily in the mechanical and electrical departments. Marshman stated he could not knowingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." In light of this evidence, I find the continued diminution of the size and strength of the unit as an adverse effect, particularly when Respondent's stated reason for subcontracting to GE was there were not enough unit employees to do the work.

Finally, I reject Respondent's argument that it had no obligation to bargain because its decision to subcontract to was, in part, because GE offered a warranty on the work it performed. The extent or scope of this warranty is unclear from the record, and it appears that GE has warranted other work in the past, including when the unit employees performed the outage work. Regardless, Respondent has cited no authority that the existence of a warranty excuses to a failure to bargain.

Respondent next argues even if it had an obligation to bargain over the decision to subcontract the work at issue, the Union waived that right by failing to timely request bargaining. A union cannot have waived bargaining where it did not receive clear and timely notice of change, nor can it have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the change and the employer's decision-making process. *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001).

Respondent claims it gave the Union timely notice of its decision to subcontract outage work beginning in February 2015, when it began providing the Union with weekly contracting reports addressing the M116 outage, and when it met with the Union during their weekly contractor meetings. Respondent, however, fails to differentiate between work associated with the outage and *bargaining unit* work associated with the outage. There is no dispute that Respondent had a history of subcontracting out work during outages, usually specialized work. Notice that Respondent intended to continue subcontracting out that work during the M116 outage is not notice of a change. The change requiring clear and timely notice is the subcontracting of the open/clean/ close work to GE. None of the weekly notification reports in evidence refer to GE or the open/clean/close work. The only weekly notification report Respondent specifically refers to in its posthearing brief is the June 5, 2015 weekly report, which indicates a need for a contractor for a job described as "Turbine Area General NDE M116." As previously stated, Cox testified that "NDE" stands for non-destructive examination, which was work historically performed by an outside contractor, not bargaining unit employees.[34]

Respondent also argues that it provided notice of the change at issue during the June 15, 2015 "all hands" meetings in which the M116 outage was raised. However, Devin Miller testified that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. Moreover, even if actual information had been shared about who was going to be performing the work, these were employee meetings, and the Board has held that notice to employees does not constitute sufficient notice to the union. *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1017.

I find the first notice Respondent gave the Union that it was going to subcontract the work at issue to GE was on February 10, 2016, when Rundt announced the decision to Bloom and Snyder after the labor-management meeting. The General Counsel alleges, and I so find, that Rundt announced this change as a fait accompli based on the statements and surrounding circumstances. The evidence establishes that Respondent began negotiating with GE to perform the work in February 2015, and they continued their discussions over the next several months. Cox testified that Respondent made the final decision to subcontract the work at issue to GE on around

to suggest it had no control over the amount of time available to it to perform the Unit 1 outage work.

[34] Although Respondent does not raise it in its posthearing brief, there is the November 6, 2015 weekly notification report, which references a job described as "Generator labor M116." I do not find this limited entry constitutes clear notice to the Union of the Company's decision to subcontract the open/clean/close work, because the report contains no other information about the scope or nature of the project, when it was going to be performed, and/or who was going to perform it. Additionally, none of the witnesses present for these weekly contractors meetings between the Company and the Union could recall any discussions about the subcontracting of the turbine/generator outage or open/clean/close work for Unit 1.

September 10, 2015, and Respondent entered into a formal purchase order with GE on around November 13, 2015. The surrounding circumstances, including the statements made to managers during the January 11, 2016 outage readiness meeting, confirm this was settled. And when Rundt met with Bloom and Snyder on February 10, 2016, he was informing them of the decisions that had been made. He made it clear that Respondent was subcontracting the turbine outage work to GE. There was nothing tentative about that in what he said. What was not settled was who was going to perform the boiler feed pump work. Rundt indicated that work also may go to GE. The Union inquired about having unit employees perform that work, and Rundt said he would check and get back to the Union. He did, and the Union ended up handling the feed pump work. I conclude that while Respondent indicated it was open to discussing the feed pump work, it informed the Union the other work was going to be done by GE. As a result, I find Respondent first informed the Union of its decision to subcontract the work at issue on February 10, 2016, as a fait accompli.[35]

I, therefore, find Respondent violated Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with timely notice and a meaningful opportunity to bargain over the decision to subcontract unit work to GE.[36]

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with the contractor's wage data and material costs

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information referred to in the Union's February 10, 2016 letter. An employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to the union representing its employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the employer must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held requested information pertaining to subcontracting, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting, the Board has held that a broad, discovery-type standard is utilized in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide the requested information. Id. In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent under the circumstances. *Disneyland Park*, supra at 1258; See also *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000). The Board also has held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258, fn. 5. See also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003); *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989).

In applying this standard, I find the Union has met its burden of establishing potential or probable relevance of the information at issue based on the statements and circumstances surrounding the request. Marshman submitted the written information request on February 10, 2016, the same day the Union first learned Respondent had subcontracted the work to GE. This written request was made after Union Steward Snyder orally requested essentially the same information, including the subcontractor's cost information. When Cox responded to Snyder's oral request, he did not raise any concern as the relevance of the requested information. Rather, he stated the information was proprietary, the Union was not entitled it, and the information was not available.

After receiving the Company's partial response to the request, Marshman contacted Cox and stated the Union needed the wage and material cost information because it if was going to try to negotiate the work that was to be performed, it "would need to know apples to apples" what it was negotiating. (Tr. 124–125). I find this sufficient to put the Respondent on notice that the Union wanted to negotiate subcontracting of this work,

[35] Respondent contends that after receiving this notice the Union should have requested bargaining, and, if it had, Respondent would have bargained over the decision to subcontract the turbine/generator outage work, as evidenced by its willingness to re-assign the boiler feed pump work to unit employees after the Union asked for them to perform it. I find this contention rings hollow. Respondent knew in early 2015 that it was going to subcontract the turbine/generator outage work, but it withheld that information from the Union for almost a year. In early September 2015, when Respondent made the final decision to subcontract the turbine/generator outage work to GE, Respondent withheld that information from the Union, even though the parties were still bargaining over a new contract, in which one of the contested issues was the performance of unit work by non-unit employees. Respondent continued to withhold information from the Union regarding its subcontracting decision after it entered into the purchase order with GE in November 2015. Respondent waited three more months, and when it informed the Union it presented the decision as final. Under these circumstances, I reject Respondent's claim that it was willing to, or the Union would have been able to, engage in meaningful bargaining over the decision to subcontract this work as of this date.

[36] The complaint in 06–CA–163303 alleges that Respondent also failed to bargain over the effects of its decision to subcontract this unit work. In its posthearing brief, the General Counsel does not mention the effects bargaining allegation. As such, I need not reach the effects bargaining issue. See *Michigan Ladder Co.*, 286 NLRB 21, 22 (1987).

and that it wanted the contractor's wage information and material costs for comparative purposes to facilitate those negotiations.

In its defense, Respondent argues that, in addition to not being relevant, it had no obligation to produce the information because it was not in its possession. An employer's duty to supply relevant information also "extends to situations where the information is not in the employer's possession, but where the information can likely be obtained from a third party with whom the employer has a business relationship." *Earthgrains Co.*, 349 NLRB 389, 397–399 (2007), enfd. in pertinent part 514 F.3d 422, 429 (5th Cir. 2008). See also *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991) (employer failed to meet its burden of demonstrating the information requested by the union was unavailable where there was no evidence it asked the third party subcontractor for the information). At the hearing, Cox acknowledged that the wage and material cost information could be requested from GE, but that he did not make that request or ask someone else to make the request. I find that Respondent has a long-standing, ongoing business relationship with GE, and it should have requested that information from GE in order to respond to the Union's information request.[37]

Consequently, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information from GE, which includes failing to request the information from GE.

CONCLUSIONS OF LAW

1. The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been and is the designated collective-bargaining representative of the following appropriate unit of employees:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended

4. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act by implementing certain provisions from its Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with its pre-impasse proposal to the Union when it implemented the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

5. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, on contract ratification.

6. On or around January 1, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act when it unilaterally subcontracted bargaining unit work during the 2016 Unit 1 outage without providing the Union with notice and an opportunity to bargain about the decision to subcontract that work.

7. On or around February 10, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested wage and material cost information from GE that is relevant and necessary to the Union's role as the unit's collective-bargaining representative.

8. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively, the Respondent shall, upon request from the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits. The Respondent shall rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification. The Respondent shall make employees make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the remaining information requested in its February 10, 2016 information request.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event

[37] Respondent makes no contention in its posthearing brief that the information at issue was proprietary or confidential.

that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2015. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., shall

1. Cease and desist from:

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work.

(c) Unilaterally implementing provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with our final, pre-impasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

(d) Conditioning changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

(e) Failing or refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

(b) Upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits.

(c) Make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

(d) Compensate the bargaining unit employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

(f) Provide the Union with the requested information sought in its February 10, 2016 request related to the wages and material costs paid by GE during the outage of Unit 1 in 2016.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 15, 2017.

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights

WE WILL NOT fail or refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local No. 272, AFL–CIO (Union) as the exclusive collective-bargaining representative of the following appropriate unit:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT fail or refuse to provide the Union with notice and an opportunity to bargain regarding changes to wages, hours, and other terms and conditions of employment, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL NOT unilaterally implement changes to wages, hours, or other terms or conditions of employment that are inconsistent with our final, preimpasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT condition implementation of changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary to its role as collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL provide the Union with notice and an opportunity to bargain over changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL, upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in our Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date we implemented the elimination of the "in-the-box" retiree health benefits.

WE WILL make employees whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

WE WILL rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

WE WILL provide the Union with the remaining information requested in its February 10, 2016 information request.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06–CA–163303 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.